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In the Supreme Court of the United States

OCTOBER TERM, A. D., 1926.

No. [redacted] 214

ADOLFO VALDES, *et al*,
Petitioner,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. [redacted] 215

FINLAY, WAYMOUTH & LEE, INC.,
Petitioner,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. [redacted] 216

ANGEL ABARCA PORTILLA, *et al*,
Petitioners,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI.

WILLIAM CATTRON RIEBY,
Lieutenant Colonel, Judge Advocate,
Attorney for Respondent.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, A. D., 1926.

No. 1021

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Petitioner,

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JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. 1022.

FINLAY, WAYMOUTH & LEE, INC.,
Petitioner,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

No. 1023.

ANGEL ABARCA PORTILLA, *et al*.,
Petitioners,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT ISSUE.

The petitioners show no substantial grounds for the issue of the writ under Rule 35—5—(b) of the Rules of this Court.

The only grounds stated by Petitioners are (Petition, p. 2) that:—

(a) "Some of the questions of federal law have not been but should be settled by this Court"; and
(b) "Others have been decided in a way believed to be in conflict with applicable decisions of this court."

But neither of those propositions is substantiated by the petition or the brief in support of it.

I

The contention sifts down to a claim that the excise and sales tax law of Porto Rico here in question (Act No. 85 of August 20, 1925; Laws of Porto Rico of 1925, pp. 584-662), is violative of the provision of Section 2 of the Organic Act of Porto Rico ("Jones Law", Act of Congress of March 2, 1917; 39 Stat. 952) "*that the rule of taxation in Porto Rico shall be uniform*", in that

(a) "*the taxes are discriminating* in their incidence against articles imported into Porto Rico" (Petition, Par. 5, page 4); and
(b) *Certain exemptions are allowed by* Section 83 of the Act (Laws of 1925, *supra*, pp. 632-634).

Confer, also, Petitioner's "Brief", pp. 16-17.

Both of those arguments are well analyzed and disposed of by the Circuit Court of Appeals, First Circuit, in a recent opinion (per ANDERSON, J., April 11, 1927, not yet reported) in two other cases arising under the same Act here in question (and involving also the similar prior Act:—Act No. 68 of July 28, 1923; Laws of Porto Rico of 1923, pp. 442-522), in which the appellant taxpayers were represented by the same Counsel appearing for the petitioners here. The opinion of the Circuit Court of Appeals in those cases,—*Sanchez Morales & Co., Inc.* v. *Gallardo*, and *Porto Rico Automobile Co.* v. *Same*, is printed in the Appendix hereto, *infra*, pp. 7-12.

It is submitted that in view of the clear analysis of the taxpayers' arguments there made by JUDGE ANDERSON, nothing substantial is left in the argument of petitioners here, except the bold claim made, on page 25 of petitioners' brief, that:—

"*The question is thus squarely presented whether a legislature which is expressly required to impose taxes according to the rule of uniformity has the power to create exemptions.*" (See also Par. 7, pp. 5–6, of Petition.)

BUT THIS COURT HAS DIRECTLY ANSWERED THAT QUESTION.

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens *or for being exempt from them*, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of the just adaptation of property to its burdens."

Pac. Exp. Co. v. *Seibert*, 142 U. S. 339, 351 (LAMAR, J.).

It is believed to be the settled rule of this court that "uniformity" does not require absolute *equality* of taxation under all circumstances; is not tantamount to "universality"; and does not prevent reasonable classification of either the property or the persons to be taxed, nor the allowance of reasonable exemptions.

Louisiana v. *Pilsbury*, 105 U. S. 278, 296.
Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232, 237–238.
Home Ins. Co. v. *New York*, 134 U. S. 594, 606.
Pac. Exp. Co. v. *Seibert*, *supra*, 142 U. S. 339, 350–352.
Guozza v. *Tiernan*, 148 U. S. 657, 662.
Watson v. *State Comptroller*, 254 U. S. 122, 124–125.
Stebbins v. *Riley*, 268 U. S. 137, 141–143.
Swiss Oil Co. v. *Shanks*, — U. S. — (February 21, 1927).

The provision in Section 2 of the Organic Act of Porto Rico that "The rule of taxation in Porto Rico shall be uniform (39 Stat. 952) is only a paraphrase of the provision of the 14th Amendment securing to every person "the equal protection of the laws."

As applied to taxation, that Constitutional provision has been said by this Court to mean,

"that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

Bell's Gap R. Co. v. *Pennsylvania, supra,* 134 U. S. 232, 238 (BRADLEY, J.), quoting with approval, *Barbier* v. *Connolly,* 113 U. S. 27, 31 (FIELD, J.).

Confer, also,

Pac. Express Co. v. *Seibert, supra,* 142 U. S. 339, 342–3, 350–51.

II.

Petitioners expressly admit ("Argument," p. 17, of Brief in support of Petition) that:

> "*The settled rule* • • • is succinctly stated in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 516, in which this Court said:
>
> 'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, *is lawful* only *when the tax is not discriminating* in its incidence against the merchandise *because of its origin* in another State'." (*italics ours*).

THERE IS NO SUCH DISCRIMINATION HERE. These taxes are valid under the rule of that case. *It is submitted that that case is decisive of the validity of these taxes; and is controlling here.*

III.

These are companion cases to Nos. 1018, 1019, and 1020, in which petitions for certiorari were presented at the same time with these petitions (*confer Petition here, par. 2, page 2, and "Brief," p. 16*).

Since counsel for Petitioners here do not urge the questions presented in those cases, we do not here burden the court with further reference to them. They are dealt with in our brief in opposition to the granting of the writ in those cases.

IV

The effect of the Act of Congress of March 4, 1927 (Pub. No. 797, 69th Cong., S. 4247), amending Sections 3 and 48 of the Organic Act of Porto Rico (see par. 10, p. 7, Petition here; and Point V, pp. 29–33, of Petitioner's Brief in support), is likewise dealt with in our brief in opposition to granting the writs in said cases 1018, 1019, and 1020 in this court, to which the court is respectfully referred.

V.

In two of these cases (the first two in the caption, Nos. 1021 and 1022), a portion of the taxes involved were levied on merchandise imported from foreign counties, after it had come to rest in Porto Rico, but while (as plaintiffs claimed) it was still in the hands of the importers, in original packages.

Those taxes (relatively small in amount), the circuit Court of Appeals held invalid (16 F (2d), 545, at p. 549; R. 137, "III"); that court holding:—

> "*Brown* v. *Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. * * * * The right of Porto Rico to tax the sales of foreign importations is not greater than the corresponding right of a State."

It is believed that the Circuit Court of Appeals erred in that portion of its opinion and decree. That, for the purposes of these sales taxes, there is no just ground for any distinction between goods brought into Porto Rico from the United States, and those imported from foreign countries. That the Constitutional limitations on the rights of States do not apply to Congress; and that the question involved is simply of the intention of Congress as evidenced by the Organic Act of Porto Rico ("Jones Law") in connection with the earlier Act ("Foraker Law"), and the amendatory Acts.

Confer:

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226.
United States v. *Heinszen & Co.* 206 U. S. 370.
Hazvik v. *Alaska Packers Assn.*, 263 U. S., 510.
Alaska v. *Troy*, 258 U. S. 101.
Tiaco v. *Forbes*, 228 U. S. 549.
Jordan v. *Roche*, 228 U. S. 436, 441.
Dorr v. *United States*, 195 U. S. 138.
Sonneborn Bros. v. *Cureton, supra*, 262 U. S. 506.

However, because of the small amount of sales taxes here involved on such goods imported from foreign countries, the Insular Government does not now desire, on that ground, to ask for a review of these decrees of the Circuit Court of Appeals.

But in case the writs of certiorari should be granted to these petitioners, so that the cases should be opened for review in

this Court, then the Respondent would desire leave to assign cross-errors in this Court, on the ground stated in this Point, as well as those mentioned in the next succeeding Point hereof.

VI.

Respondent, appellee in the Circuit Court of Appeals, and defendant in the District Court, insisted in each of those Courts that a court of equity was without jurisdiction to enjoin the taxes here in question, both because these petitioners (plaintiffs and appellants in the lower courts) had and have an adequate remedy at law by paying the taxes and suing for their return under the "tax refund" Acts of Porto Rico; and also because, under Section 3224 of the Revised Statutes, a federal court might not enjoin Insular taxes levied under Federal (as contra-distinguished from State) authority by the Legislature of Porto Rico, an instrumentality of Congress.

The Circuit Court of Appeals overruled those contentions, and dealt with the cases on their merits, holding that there was jurisdiction in equity.

In case this Court should decide to grant writs of certiorari to these petitioners, and thus open these cases for review in this Court, the Respondent would desire leave to assign cross-errors on these questions, also.

CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari in these cases should be denied.

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Attorney for Respondent.

GEORGE C. BUTTE,
Attorney General of Porto Rico,
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APPENDIX

Opinion of the Circuit Court of Appeals, First Circuit, in Sanchez Morales & Co., Inc., v. Juan G. Gallardo, Treasurer of Porto Rico, and in Porto Rico Automobile Co., Inc., v. same; April 11, 1927, not yet reported.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1926.

No. 2003.

SANCHEZ MORALES & CO., INC.,
Plaintiff, Appellant,

v.

JUAN G. GALLARDO, Treasurer,
Defendant, Appellee.

No. 2004.

PORTO RICO AUTOMOBILE CO., INC.,

v.

SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

OPINION OF THE COURT.

April 11, 1927.

ANDERSON, J. These two tax cases are conceded by learned counsel for the appellants to be indistinguishable from 29 of the 43 cases disposed of in a single opinion of this court on January 7, 1927, 16 Fed. (2d) 545.

The court below sustained demurrers and dismissed the bills, which allege that the plaintiffs are dealers in motor

vehicles and accessories, pneumatic tires, phonographs, radio sets, pianos, pianolas, typewriters, safes, glass show-counters, cash registers and adding machines, all transported into Porto Rico from the United States; and that of these articles only glass show-cases are manufactured in Porto Rico.

Counsel now urge that this court was wrong in its expressed view, 16 Fed (2d) 545, that the West India Oil case, 6 Fed. (2d) 523, disposed of the minor contentions raised in the 29 cases and now raised in these two cases.

The first contention is stated as follows:

"The Act of 1923 discriminates against articles manufactured or produced outside of Porto Rico in that upon such articles the taxes are computed upon a higher basis of value than upon domestic articles; and such discrimination is an unlawful regulation of and burden upon interstate and foreign commerce."

This is plainly unsound. Goods imported from (say) New York are when landed in Porto Rico treated by the Tax Act precisely as though manufactured in Porto Rico. Transportation to Porto Rico of New York goods is a part of the basic cost in Porto Rico of the imported goods. The importer and the local manufacturer are both taxed on the basis of cost in Porto Rico plus a profit of 10 percent, unless adjusted to a lower rate under Sec. 6 of the Act. The proper comparison is not between manufacturing costs in New York,—followed perhaps by a sale in New York to the importer at a price increased by the manufacturer's profit,—and the manufacturing cost of goods produced in Porto Rico. When in Porto Rico,—whether manufactured in Porto Rico or in the States and transported to Porto Rico,—the first sale is taxed. There is no discrimination against goods produced in the States. The New York manufacturer can compete with the Porto Rican manufacturer only by putting his goods into Porto Rican market. The local manufacturer is entitled to such advantage as accrues from his remoteness from the large manufacturing centres. Whether the amounts of local competitive manufacturing is sufficient to make appellants' claim, even if found of any legal significance,—is, on this record, doubtful. But it is not sound.

Appellants' second contention is thus stated:

"The definition of the term ad valorem contained in section 6 of the Act of 1923 (substantially identical with section 4 of the Act of 1925) causes an inequality of valuation for the purpose of fixing the tax, and thus makes the statute operate unequally as between members of the same class and thereby causes, not only a lack of uniformity, but, also, a denial of the equal protection of the laws, in violation of the Organic Act of Porto Rico and the fourteenth amendment of the Constitution."

Section 6 reads:

"Section 6. Definition of the phrase ad valorem.—For the purposes of this Act the phrase ad valorem shall be construed to mean the cost of the article after it is in the possession of a person, plus a reasonable benefit to be estimated at ten percent over the amount of said cost, unless such person proves, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such article is less than ten percent; Provided, That the word 'person' as used in this section shall be given the meaning given thereto in section 7 hereof."

The argument is that, as some sales may possibly be made at less than cost and others at a profit in excess of 10 percent, the necessary result is lack of the uniformity required by the Organic Act.

This contention is based on a misapprehension of the fundamental nature of the tax. It is not a tax on property or on profits. It is an excise tax levied on the "sale, use, consumption or exhibition in Porto Rico" of the named articles. There is no "classification" as the term is used in most of the cases cited and relied upon. In Title II,—entitled "Excise and License Taxes,"—Part I deals with Excise Taxes, in §20 with 53 subdivisions; Park II deals with "License Taxes," in §21 with 42 subdivisions. In §20, about 20 of the excise taxes are specific, *e. g.*, $1 a liter on brandy; about 30 are ad valorem; a few are mixed. The ad valorem taxes are: at 5 percent on sales, etc., of 7 articles; at 10 percent, on 16 articles; others at 15, 30 and 40 percent. Perhaps even more varied are the license taxes imposed, each three months, on numerous kinds of manufacturers and dealers; some of them divided into as many as five classes, the gradation to be made by the

Treasurer (§23) "according to the relative importance of the establishment as measured by the volume of business transacted, irrespective of the net profit or gain derived therefrom, but with due regard to the business or industry to which it bears most intimate similarity."

Thus profits are expressly excluded as a basis for the license tax. All licenses of the same class pay the same license fees, even though doing unequal amounts of business or deriving unequal profits from the same volume of business.

Turning to the ad valorem excises, there is no classification of the various dealers and manufacturers affected; but all dealers in or manufacturers of the same articles are required to pay the same percentage on their sales. There is no discrimination between large and small, between citizens and foreigners, or otherwise. The tax is uniform when the business conditions are uniform,—a result impossible of exact attainment.

It is of course true that, as about 90 percent of the base on which the tax is computed is the cost, the tax may affect differently dealers and manufacturers who buy or produce the same articles at different costs. The shrewd and successful buyer or manufacturer will pay a less tax because of his ability or good fortune as a buyer or manufacturer. And the ingenious and attractive seller may sell at a better profit than his less efficient competitor and thus feel the tax less. Of course competition will tend to drive competitors toward equality of selling price. But (to repeat) the tax is not on profits; it does not attempt to create equality in business or economic result; it is uniform in incidence when the business conditions are uniform. This is enough.

The provision for increasing the cost by a hypothetical 10 percent profit is, on analysis, of negligible significance. As noted above, the majority of the ad valorem excises are at 10 percent. Obviously, a 10 percent tax on cost plus 10 percent profit would be 11 percent of cost, or one percent more than the profit. All normal business would therefore be done on a profit of (perhaps) about 20 percent, leaving 9 percent net. The 40 percent tax on arms and ammunition would require a 44 percent mark-up to break even.

On the seven 5 percent excises, there is a remote possibility of an advantageous adjustment under §6 to less than a 10 percent

profit. A 5 percent tax on cost plus (say) a 5 percent profit would be 5.25 percent of cost as compared with 5.5 percent of cost if a 10 percent profit be assumed. A difference of ¼ of one percent would not be enough to induce a dealer to scale his profits to 5 percent and then seek reduction of the tax under §6.

For practical purposes the excises will be computed on cost plus 10 percent. At any rate, all the taxes imposed on the present plaintiffs and their competitors are 10 percent, requiring (as noted above) additions of 11 percent or more for business not headed for bankruptcy.

Of course dealers may, in closing-out or slaughter sales, sell at cost or less and yet be taxed on the original cost, even after obtaining the relief contemplated by §6. Whether such victims of (theoretically) excessive taxation would be legally aggrieved is a question not presented on this record. Compare §41, authorizing exemption when the property is destroyed or becomes unfit for sales. Certainly tax payers doing business along lines of normal profits cannot escape excise taxes on the theory that such excises bear too heavily on sellers at less than cost,—an unwholesome sort of competition entitled to no discriminating favor in public policy, as it certainly has none from dealers carrying on business with the usual and desirable motive of making a profit thereby.

Tax laws are practical undertakings. They deal with normal business enterprises. The requirement of uniformity does not extend to the utterly impractical limit of compelling mathematical or scientific equality of incidence. No property tax accomplishes that result. The owner of realty, unrented or leased to an irresponsible tenant, finds his tax a heavy burden, while his neighboring owner of property leased at a good and promptly paid rental finds the tax easy to pay. The shrewd buyer of foreign goods subject to an ad valorem import tax pays less tariff and thus adds to the margin between him and his less efficient competing importer. But these inequalities of result grow out of inequalities in business conditions and activities, not possible of control by law. They are unavoidable; they do not originate in the law. They are not cases of intentional and arbitrary discrimination. *Sunday Lake Iron Co.* v. *Wake-*